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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BARTELL RANCH LLC, *et al.*,

Plaintiffs,

vs.

ESTER M. MCCULLOUGH, *et al.*,

Defendants.

WESTERN WATERSHEDS
PROJECT, *et al.*,

Plaintiffs,

vs.

UNITED STATES DEPARTMENT
OF THE INTERIOR, *et al.*,

Defendants.

Lead Case:

Case No.: 3:21-cv-00080-MMD-
CLB

Consolidated with:

Case No.: 3:21-cv-00103-MMD-
CLB

**WINNEMUCCA INDIAN
COLONY'S MOTION TO
INTERVENE**

1 The WINNEMUCCA INDIAN COLONY (“Colony” or “Intervenor”),
 2 represented by its duly elected and recognized Council, and, by and through its counsel,
 3 Maddox & Cisneros, LLP, submits this Motion to Intervene as a plaintiff, pursuant to
 4 Fed. R. Civ. Pro. 24(a) and (b).

5 This Motion is supported by the proposed Complaint, **Exhibit 1**, and the
 6 Declaration of Judy Rojo, the Colony’s Tribal Chairman, **Exhibit 2**.

7 **MEMORANDUM OF POINTS AND AUTHORITIES**

8 The Colony should be permitted to intervene, either as a matter of right or
 9 permissively, based upon the impact to the Colony’s interests and rights resulting from
 10 this litigation.

11 **I. RELEVANT FACTS**

12 The background and history of the Colony demonstrate that it has a protected
 13 interest in this action, warranting intervention.

14 **A. The land**

15 The Winnemucca Indian Colony is a federally recognized Tribe with lands
 16 located in Winnemucca, Nevada. President Woodrow Wilson set aside 160 acres for
 17 the benefit of the homeless Shoshone by Executive Order dated June 18, 1917,
 18 described as the NE ¼ of Section 32, Township 36N., Range 38E., M.D.M. (Mount
 19 Diablo Meridian). President Wilson set aside an additional 160 acres for the benefit of
 20 the homeless Shoshone by Executive Order dated February 8, 1918, described as the
 21 SE 1/4 of Section 32, Township 36N., Range 38E., M.D.M. (Mount Diablo Meridian).
 22

23 In 1928, because the BIA records reflected that the homeless Shoshone were
 24 still living on 20 acres near the railroad where they worked, a separate 20 acres was
 25 conveyed by Congressional Act, described as N1/2 NE1/4 SW1/4, Section 29,
 26 Township 36, Range 38 East, Mount Diablo Meridian, Nevada, containing 20 acres
 27 more or less. These three parcels have at all times since 1928 been referred to and
 28 recognized as the lands of the Winnemucca Indian Colony. These lands are potentially

1 irrigable acreage and have a right to water rights incumbent thereto as agricultural
2 lands.

3 The Colony is a sovereign entity and the recognized Council is charged with
4 governance of its lands. Judy Rojo, Eric Magiera, Misty Morning Dawn Rojo Alvarez,
5 Shannon Evans and Merlene Magiera are the recognized Council of the government
6 of the Colony, duly elected by the verified and enrolled members of the Colony.

7 **B. The interest**

8 Intervenor seeks to intervene in this action to challenge the Bureau of Land
9 Management's ("BLM") Record of Decision ("ROD") approving the Thacker Pass
10 Lithium Mine Project Plan of Operations. For example, the Colony has residents,
11 members, and employees who possess direct religious and cultural connections to
12 Thacker Pass, also sometimes known to the members as Peehee mu'huh, as the
13 members practice ceremony there, hunt and gather there, and plan on doing so in the
14 future. Rojo Declaration at ¶ 3. Colony members practice the Sundance ceremony at
15 or near Peehee mu'huh every year. *Id.* at ¶ 4. The Colony's practice of the Sundance
16 originates from the time when Wovoka, a Paiute spiritual leader, shared the Paiute
17 Ghost Dance to leaders in South Dakota and returned with the Sundance, which
18 incorporated the Colony's traditions. *Id.* at ¶ 5. The Sundance ceremony is a sacred
19 prayer dance and rigorous ceremony lasting ten days and requiring sacrifice and
20 commitment. *Id.* at ¶ 6. On February 22, 2000, Chairman Rojo's close relative, Glen
21 Wasson, was murdered at the Winnemucca Indian Colony, and since then, she has
22 personally committed to perform the Sundance every year with the other members, as
23 the ceremony carries the promise of healing through a demanding process of
24 purification, sacrifice and prayer. *Id.* at ¶ 7. The Sundance is a way of life for Colony
25 members, a way of reaching through seven generations back and forward for
26 betterment. *Id.* at ¶ 8. To build the Thacker Pass Lithium Mine on lands held sacred to
27 Colony members would be like raping the earth and their culture. *Id.* at ¶ 9.
28

1 In addition to the Sundance, Tribal members engage in vision quests at or near
2 Peehee mu'huh. A vision quest entails isolation and deep contemplation in the natural
3 environment. Such vision quests are of important religious significance to Tribal
4 members. *Id.* at ¶ 10.

5 Tribal members also hunt deer, rabbit, and ground hogs at Peehee mu'huh. *Id.*
6 at ¶ 11. Tribal members also gather medicinal plants at Peehee mu'huh. *Id.* at ¶ 12.

7 Peehee mu'huh is further sacred to Colony members, as they believe their
8 ancestors were murdered there during an 1865 massacre. *Id.* at ¶ 13.

9 Intervenor maintains that BLM's ROD violated the National Historic
10 Preservation Act ("NHPA") 16 U.S.C. §§ 470 et seq., and the Administrative
11 Procedure Act ("APA"), 5 U.S.C. §§ 701 et seq. because BLM issued the ROD before
12 complying with the NHPA's Section 106 requirements requiring meaningful
13 government-to-government consultation with Indian tribes and before complying with
14 NHPA's Section 106 requirements pertaining to seeking and considering the views of
15 the public in a manner that reflects the nature and complexity of the undertaking.
16 Notwithstanding these violations, Defendant Intervenor Lithium Nevada Corp.
17 ("Lithium Nevada") still intends to begin 20 destructive, mechanical trenching
18 operations in Peehee mu'huh.

19
20 The NHPA requires that the BLM must complete the Section 106 process prior
21 to the approval of the expenditure of any Federal funds on the undertaking, or prior
22 to the issuance of any license. The BLM did not complete the section 106 process with
23 the Intervenor prior to issuing the ROD. It appears that the BLM is poised to issue a
24 permit to Lithium Nevada to begin desecration of Peehee mu'huh without completing
25 the Section 106 process with Intervenor. In light of their interest in completing the
26 NHPA Section 106 process before the ROD or any archaeological permits are issued,
27 the Intervenor meets the standards either for intervention as of right under
28 Fed.R.Civ.P. 24(a), or for permissive intervention under Fed.R.Civ.P. 24(b).

II. LEGAL STANDARD

Fed.R.Civ.P. 24(a), which governs intervention as a matter of right provides:

On timely motion, the court must permit anyone to intervene who:

....

- (2) claims an interest relating to the property or transaction that is the subject of the action and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

When analyzing a motion to intervene as a matter of right under Fed. R. 22 Civ. P. 24(a)(2), the Court applies a four-part test:

- (1) the motion must be timely; (2) the applicant must claim a "significantly protectable" interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the parties to the action.

Wilderness Soc'y v. U.S. Forest Serv., 630 F.3d 1173, 1177 (9th Cir. 2011) (quoting *Sierra Club v. EPA*, 995 F.2d 1478, 1481 (9th Cir. 1993) and citing *Scotts Valley Band of Pomo Indians v. United States*, 921 F.2d 924, 926 (9th Cir.1990)).

In evaluating whether Fed.R.Civ.P. 24(a)(2) requirements are met, the Court follows "practical and equitable considerations" and construes the rule "broadly in favor of proposed intervenors." *Wilderness Soc'y* at 1179. The court does so because "a liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts." *Id.*

Fed. R. Civ. P. 24(b)(1)(B) provides that "[o]n timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact."

III. LEGAL ARGUMENT

The Court should grant this Motion because this Motion is timely; Intervenor has a significant protectable interest relating to Thacker Pass; the disposition of the action will impair or impede Intervenor's ability to protect its interest; and Intervenor's interest is inadequately represented by the parties to the action.

A. This Motion is timely.

In determining whether a motion to intervene is timely, the Court weighs three factors: (1) the state of the proceeding in which the applicant seeks to intervene; (2) the prejudice to the other parties; and (3) the reason for and length of any delay. *County of Orange v. Air California*, 799 F.2d 535, 537 (9th Cir. 1986). "Although delay can strongly weigh against intervention, the mere lapse of time, without more, is not necessarily a bar to intervention." *US v. Alisal Water Corp.*, 370 F.3d 915, 25 921 (9th Cir. 2004). In *Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1074 (D.C. Cir. 1998), the D.C. Circuit found that a district court erred when it denied an applicant's motion to intervene even after "the district court had entered only a preliminary injunction, not a permanent injunction."

The state of the proceeding warrants intervention. On November 8, 2021, the Court determined that Plaintiffs and current Plaintiff Intervenor lacked prudential standing to assert claims on behalf of the Winnemucca Indian Colony. Order Denying Motion for Reconsideration, ECF No. 117 at 3:21. Though the decision and the Court's denial of Intervenor's Motion for Preliminary Injunction has now been appealed, *see* Notice of Appeal, ECF No. 161, the Court's decision compels intervention by the Winnemucca Indian Colony as a proposed direct Plaintiff.

In the meantime, no administrative record has been filed. No party has filed a motion for summary judgment. Intervenor thus seeks intervention at an early stage of the proceedings. These facts warrant intervention.

///

B. The Colony has a significant interest in the subject of this action.

The Ninth Circuit has “rejected the notion that Rule 24(a)(2) requires a specific legal or equitable interest.” *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980); *see also Blake v. Pallan*, 554 F.2d 947, 952 (9th Cir. 1977). Rather, “the ‘interest’ test is “primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.” *Nuess v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967).

Here, the Colony has deep and long-standing connections to the lands and cultural resources impacted by the Project if it goes forward, and they should be allowed to defend those interests as an intervenor, including its interest in ensuring that cultural and archaeological resources are protected and that proper consultation with the Colony occurs.

C. Denying intervention to the Colony would impair its ability to protect its interest.

The Colony meets this requirement because the disposition of this action “may as a practical matter” impair or impede the Colony’s ability to safeguard its protectable interests. *See Smith v. Los Angeles Unified Sch. Dist.*, 830 F.3d 843, 862 (9th Cir. 2016) (quoting Fed. R. 22 Civ. P. 24(a)(2)). The Court should grant this Motion because a decision in favor of Defendants would have far-reaching practical consequences for the Colony’s ability to safeguard its protectable interests – archaeological and cultural resources. Granting this Motion would further ensure that the federal government engages in consultation with tribal governments.

For example, the Federal Bureau of Land Management (“BLM”) did not provide the Colony a reasonable opportunity to identify concerns about historic properties in Peehee mu’huh, advise on the identification and evaluation of historic properties there, including those of traditional religious and cultural importance, articulate views on the Thacker Pass Lithium Mine Project’s (“the Project’s”) effects on such properties, or

1 participate in the resolution of adverse effects as required by the National Historic
2 Preservation Act (NHPA) before the Thacker Pass Record of Decision (“ROD”) and
3 Plan of Operations (“POO”) was issued. Rojo Declaration at ¶ 14.

4 On April 14, 2021, Kathleen Rehberg, Humboldt River Field Office Field
5 Manager for BLM, sent Chairwoman Rojo a letter, asking if the Colony considered any
6 of the archaeological sites contained in the POO as having religious or cultural
7 importance. *Id.* at ¶ 15. On April 19, 2021, Chairwoman Rojo wrote a letter to Ms.
8 Rehberg and expressed the Colony’s opposition to the Project, at least until the Colony
9 had the opportunity to review and assess for itself the sufficiency of the data collected
10 and operational plans of the Project. *Id.* at ¶ 16. Chairman Rojo further explained that
11 the Colony had been actively working to reclaim its trust lands, especially over the last
12 three years, cleaning up massive amounts of solid and hazardous waste that had
13 accumulated over the past few decades on its trust lands; that the Colony was working
14 to remove the three or more criminal drug enterprises operating on the Colony; and
15 that meanwhile, the Colony was initiating an economic development plan in hopes of
16 becoming financially self-sufficient. *Id.* at ¶ 17. Chairman Rojo further stated to Ms.
17 Rehberg that the Colony was concerned about the fact that surface water flowing
18 through Water Canyon Creek over the past 40-50 years had diverted and nearly dried
19 up the drainage except during snowmelt and active rain storms; that groundwater had
20 been pumped and diverted from Colony trust lands to the City of Winnemucca, private
21 irrigators, and other users; and that as the Project was located between the Quinn River
22 and Kings River, each of which were in the Colony’s aboriginal territory, members
23 were concerned about potential adverse impact from diversion. *Id.* at ¶ 18. Chairman
24 Rojo’s efforts to communicate with BLM occurred during a time that the Colony was
25 embroiled in a twenty-year long litigation with the BIA regarding lack of services and
26 funding to the Colony and the Colony’s aforementioned efforts to remove criminal
27 drug enterprises on Colony land. *Id.* at ¶ 19.
28

1 As a result of lack of funding, the Colony does not have a Tribal Resources
2 Officer. *Id.* at ¶ 20.

3 Today, Chairman Rojo is further concerned about the effects of pollution of
4 said waters and its adverse impact on water serving the Colony. *Id.* at ¶ 21. She is also
5 concerned about the effects of pollution on the sacred land where members hold the
6 Sundance, and the land where members hunt and gather medicinal herbs. *Id.* at ¶ 22.

7 Chairman Rojo further stated to Ms. Rehberg that the Colony was very
8 concerned about the protection and conservation of its aboriginal lands that are under
9 the jurisdiction and influence of the BLM; the Colony believed there may be
10 archaeological sites, religious and traditional sites, and areas of cultural importance to
11 our Colony that may be desecrated or destroyed. *Id.* at ¶ 23. She further stated the
12 Colony was concerned that BLM had not adequately complied with its own Tribal
13 Consultation Policy and Handbook, 1780-1, and more specifically with implementation
14 of Environmental Protection Agency's Environmental Justice Program to include tribes
15 and tribal members to effectively provide for environmental and public health
16 protection in Indian Country in areas of Environmental Justice. *Id.* at ¶ 24. She further
17 stated that the Colony was surprised and concerned that both the BLM and the
18 Nevada State Historic Preservation Office had approved the Historic Properties
19 Treatment Plan (HPTP) to mitigate impacts to archaeological sites in the mine's POO
20 boundary without any talks or discussion with the Colony; and that the members were
21 concerned that Final Formatted LNC Thacker HPTP stated that consultation was held
22 with the Winnemucca Indian Colony beginning in 2017 and continued to date, as
23 members believed that it was not true, and that BLM or others had in fact not
24 consulted with the Winnemucca Indian Colony regarding the Project; Chairman Rojo
25 asked for dates and individual names of anyone in the Colony or documents, positions
26 taken, who may have discussed this Project with BLM or its representatives. *Id.* at ¶
27 25.
28

1 On July 14, 2021, because BLM did not respond to the Colony's April 19 letter,
2 Chairman Rojo sent a letter, copying BLM, to Jean Prijatel, Manager in the
3 Environmental Review Branch, United States Environmental Protection Agency. *Id.*
4 at ¶ 26. Therein Chairman Rojo repeated the concerns set forth in her April 19, 2021,
5 letter to the BLM. *Id.* at ¶ 27.

6 Chairman Rojo asserts that if the Colony is provided a reasonable opportunity
7 to consult with the BLM about effects to Peehee mu'huh's historic properties, the
8 Colony will advise BLM about its concerns, including those herein stated; the Colony
9 will encourage BLM to allocate Peehee mu'huh to the "Conservation for Future Use"
10 and "Traditional Use" categories and to provide Peehee mu'huh with long-term
11 preservation as described in BLM Manual 8110. 12 21. *Id.* at ¶ 28.

12 Chairman Rojo further asserts if the Colony is provided a reasonable
13 opportunity to participate in the resolution of adverse effects to historic properties in
14 Peehee mu'huh, the Colony will help the BLM understand that gouging seven, 40-
15 meter-long, several-meter-deep trenches and hand-digging as many as 525 holes into
16 land hallowed by the massacre of Colony ancestors and where members observe
17 religious ceremonies severely disrespects their culture and traditions, causes them
18 extreme emotional and spiritual distress, and is a desecration of the worst kind. *Id.* at
19 ¶ 29.

20 Chairman Rojo further asserts if BLM and Lithium Nevada still insist on
21 disrespecting the Colony's traditional ways, distressing its members emotionally and
22 spiritually, and desecrating land they consider sacred, the Colony will advise BLM on
23 how to perform this desecration in the most sensitive manner possible; because the
24 desecration of Peehee mu'huh is so imminent, the Colony is forced to seek relief,
25 including preliminary relief, in order to protect its interests in protecting historic
26 properties the Colony attaches religious and cultural significance to. *Id.* at ¶ 30.
27
28

The Colony meets the third Rule 24(a)(2) factor because it has demonstrated that the Project impairs its interest.

D. The existing parties will not adequately represent the Colony.

An applicant for intervention of right need only make a minimal showing that “representation of [its] interest ‘may be’ inadequate.” *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972); *see also California v. Tahoe Reg’l Planning Agency*, 792 F.2d 775, 778 (9th Cir. 1986). A would-be intervenor is adequately represented if the following factors are met:

1. The interests of a present party to the suit are such that it will undoubtedly make all of the intervenor’s arguments;
2. The present party is capable of and willing to make such arguments; and
3. The intervenor would not offer any necessary element to the proceedings that the other parties would neglect.

County of Fresno, 622 F.2d at 438–39.

Here, the Court itself stated that current Intervening Plaintiffs lacked prudential standing to protect the interests of the Colony. *See* September 3, 2021 Order (ECF No. 6) at 6:8-15. Thus the existing parties will not adequately represent the interests of the Colony, making intervention appropriate.

Indeed, The Colony’s interests separate from, and as critical as, the interests advanced by other plaintiffs in this matter. *See, generally*, Rojo Decl. Moreover, if other Plaintiffs prevail in this case, as they should, it is possible that this Court may craft a remedy that will not address and could harm the Colony’s unique sovereign interest, including obligations of the federal government to consult with the Colony. To support this contention, federal courts have ruled that “consultation with one tribe doesn’t relieve the [agency] of its obligation to consult with any other tribe.” *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 205 F.Supp.3d 4, 32 (D.D.C. 2016) (citing *Quechan*

1 *Tribe of Fort Yuma Indian Reservation v. U.S. Dep't of Interior*, 755 F.Supp.2d 1104, 1112 &
 2 1118 (S.D. Cal. 2010)). “Defendants’ grouping tribes together (referring to consultation
 3 with ‘tribes’) is unhelpful: Indian tribes aren’t interchangeable, and consultation with
 4 one tribe doesn’t relieve the BLM of its obligation with any other tribe that may be a
 5 consulting party under NHPA.” *Quechan Tribe*, 775 F. Supp.2d at 1112. No other party
 6 can adequately represent the sovereign interest of the Colony.

7 **E. In the alternative, the Colony satisfies the requirements for**
 8 **permissive intervention.**

9 In the alternative, this Court should exercise its discretion to grant the Colony
 10 permission to intervene under Rule 24(b). That rule provides in pertinent part that,
 11 “On timely motion, the court may permit anyone to intervene who . . . (B) has a claim
 12 or defense that shares with the main action a common question of law or fact.” Fed.
 13 R. Civ. P. 24(b)(1). Generally, permissive intervention requires ““(1) an independent
 14 ground for jurisdiction; (2) a timely motion; and (3) a common question of law and fact
 15 between the movant’s claim or defense and the main action.”” *Blum v. Merrill Lynch Pierce*
 16 *Fenner & Smith Inc.*, 712 F.3d 1349, 1353 (9th Cir. 2013) (citation omitted).

17 In determining whether to exercise its discretion to grant permissive
 18 intervention, the Court considers “whether the intervention will unduly delay or
 19 prejudice the adjudication of the original parties’ rights.” Fed. R. Civ. P. 24(b)(3). The
 20 Colony meets these requirements.
 21

22 First, jurisdiction is easily established because this is a federal-question case. 28
 23 U.S.C. §1331; *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 844 (9th Cir.
 24 2011) (“In federal-question cases there should be no problem of jurisdiction with
 25 regard to an intervening defendant nor is there any problem when one seeking to
 26 intervene as a plaintiff relies on the same federal statute as does the original plaintiff.”)
 27 (citations omitted). Second, the Colony’s motion is timely. *Supra*. Third, this case
 28 presents a common question of law and fact between the Colony’s claims and the main

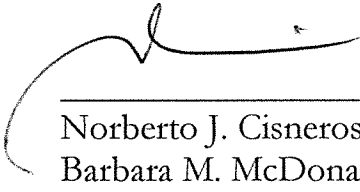
1 action, primarily whether the federal defendant complied with its obligations under the
2 NEPA, NHPA, and other federal environmental/cultural resource statutes. *Supra*.
3 Fourth, Defendants will suffer no conceivable prejudice, at this stage in the
4 proceedings, due to intervention by the Colony. Allowing the Colony to intervene will
5 aid the Court to better assess the actions of the United States.

6 For these reasons, this Court should exercise its discretion to allow the Colony
7 to intervene.

8 **IV. CONCLUSION**

9 For the reasons discussed above, the Colony respectfully submits that it is
10 entitled to intervene as of right. Alternatively, this Court should allow the Colony to
11 intervene on a permissive basis.

12 Dated this 11th day of February, 2022.

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28

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of February, 2022, I served a true and correct copy of the above document, entitled **WINNEMUCCA INDIAN COLONY'S MOTION TO INTERVENE**, via the Court's electronic filing/service system (CM/ECF) to all parties on the current service list.



An Employee of Maddox & Cisneros, LLP

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